IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

CONNER AIR LINES, INC., and E. A. CONNER,

Petitioners,

v.

AVIATION CREDIT CORPORATION, L. B. SMITH AIRCRAFT CORPORATION and L. B. SMITH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE
THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

CITATION TO OPINIONS BELOW

The opinion and judgment of the United States District Court in and for the Southern District of Florida is unreported. The opinion of the Court of Appeals is not yet reported. The text of the opinion is attached hereto as Appendix A.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) The date of the judgment sought to be reviewed is June 30, 1960.

(ii) The date of the order denying petitions for rehearing is August 12, 1960. No petition for extension of time to petition for certiorari has been applied for or granted.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

THE QUESTION PRESENTED FOR REVIEW

WHERE A LENDER IN A FLORIDA TRANSACTION HAS BEEN FOUND GUILTY OF CIVIL USURY, AND SPECIFIC AMOUNTS OF INTEREST AND BONUS HAVE BEEN FOUND TO HAVE BEEN INCLUDED IN THE FACE PRINCIPAL SUM OF NEGOTIABLE NOTES TAKEN BY THE LENDER FROM THE BORROWER, DOES FLORIDA LAW REQUIRE THE FEDERAL COURT TO DEDUCT

FROM THE ACTUAL PRINCIPAL SUM INVOLVED AN AMOUNT EQUAL TO DOUBLE THE INTEREST AND BONUS SO FOUND TO HAVE BEEN RESERVED OR EXACTED?

Both the District Court and the Court of Appeals found respondents guilty of civil usury. The District Court deducted an amount equal to double the bonus but refused to deduct an amount equal to double the interest. The Court of Appeals refused to deduct any amount from the actual principal sum and restored respondents' judgment to the full principal sum.

THE STATUTES INVOLVED

The statutes involved are Florida Statutes 1955: §687.03 and §687.04, reading as follows:

> 687.03 Unlawful rates of interest defined; proviso. — It shall be usury and unlawful for any person, or for any agent, officer or other representative of any person, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, except upon an obligation of a corporation, a rate of interest greater than ten per cent per annum, either directly or indirectly by way of commission for advances, discounts, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten per cent; and such transaction with a corporation shall, whereby the

corporation pays interest, be usury and unlawful if for a rate of interest greater than fifteen per cent per annum. The provisions of this section shall not apply to sales of bonds in excess of one hundred dollars and mortgages securing the same, or money loaned on bonds.

687.04 Penalty for usury; not to apply to transferee of negotiable paper unless usury appears on face. ⇔ Any person, or any agent, officer or other representative of any person, willfully violating the provisions of Sec. 687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved; or has been paid, then and in that event the person, who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted; provided, however, that this shall not apply to a bona fide endorsee or transferee of negotiable paper purchased before maturity, unless the usurious character should appear upon its face, or that the said endorsee or transferee shall have had actual notice of the same before the purchase of such paper, but in such event double the amount of such usurious interest may be recovered after payment, by action against the party originally exacting the

same, in any court of competent jurisdiction in this state, together with an attorney's fee, as provided in Sec. 687.06.

STATEMENT OF THE CASE

The respondent Aviation Credit Corporation, a Delaware corporation, filed suit to quiet title, seeking a declaration that it was the full legal and equitable owner of a Douglas DC-6 aircraft and its equipment. One of the defendants was the United States of America, three individual defendants were citizens and residents of the State of Florida, and the defendant Conner Air Lines, Inc., was a Florida corporation. Jurisdiction of the United States District Court was based on diversity of citizenship and joinder of the United States of America as a defendant, and on the amount involved, to wit, $600,254.67 plus interest. No question exists as to the jurisdiction of the District Court.

Conner Air Lines, Inc. and F. A. Conner counterclaimed against plaintiff and cross-claimed against respondents L. B. Smith Aircraft Corporation, an Ohio corporation, and L. B. Smith, a citizen and resident of the State of Nevada. The defense, the counterclaim and the cross-claim were based upon a charge of usury.

Following trial before the District Court without a jury, said Court found that interest computed at the rate of 11.58% per annum, plus a $33,310.18 bonus for financing, had been included in the face principal sum of negotiable promissory notes aggregating $600,254.67, and that the aforesaid bonus had been reserved by respondents in willful violation of the Florida usury law.

The actual principal sum involved was found to have been $459,083.50, and the District Court ordered the deduction of $66,620.36, an amount equal to double the bonus for financing which had been found to have been reserved.

The United States of America and its agent Ralph Delgado were made parties defendant by virtue of seizure of the aircraft under asserted tax liens, were not parties to the appeal and are not parties to this proceeding. Joseph G. Moretti is the holder of a mortgage encumbering the aircraft and inferior to the mortgage lien of respondent Aviation Credit Corporation.

Appeals to the United States Court of Appeals were taken by these petitioners and by respondent Aviation Credit Corporation, these petitioners contending that the District Court should have deducted the additional sum of $169,997.62, being the amount equal to double the interest exacted, to wit, $84,994.31, and Aviation Credit contending that neither the interest nor the bonus should have been doubled and deducted from the actual principal sum.

The Court of Appeals affirmed the trial court's finding of civil usury, but held that neither the interest nor the bonus had been paid by these petitioners, nor reserved, taken or exacted by respondents, within the prohibitions of Florida law.

The District Court's findings of fact and conclusions of law appear on pages 104 through 115 of the transcript of record. The opinion of the Court of Appeals dated June 30, 1960, appears as Appendix A attached to this petition. On August 31, 1960, the Court of Appeals entered its order staying its mandate for a period of thirty days to enable

these petitioners to apply for and obtain a writ of certiorari from this honorable court, the stay to continue in force until final disposition of the case by this Court (R. 812).

ARGUMENT

Jurisdiction of this court in the premises is based upon the fact that the United States Court of Appeals, by the decision here sought to be reviewed, has decided an important question in a way in conflict with applicable state law. U.S. Sup. Ct. Rule 19(b).

By adopting a rule contrary to that followed uniformly and without a single departure in the Florida state courts, the Court of Appeals has thrown the usury law in Florida into a state of extreme confusion. This conflict between the decision of the federal court and the decisions of the Florida courts necessarily will result in uncertainty, confusion, doubt and multitudinous litigation in the fields of commerce and finance in this area of our nation. Further, it is sure to result in races to court and forum shopping among parties to real or imagined grievances.

Every Florida case on the point here in issue holds that the inclusion in the face principal sum of a negotiable note of excessive interest or bonus raises a positive requirement of law that double the sum so included be deducted from the actual principal sum involved.

There is no other or alternative rule in Florida law, and once the Court has found, as in the instant case, that the lender has included usurious interest or bonus in the

face principal sum of a negotiable note, it follows necessarily, conclusively and as a matter of law that such interest or bonus has been reserved and exacted.

In **Wilson v. Conner** (Fla. 1932) 106 Fla. 6, 142 So. 606, **the borrower never had paid a dime to the lender, either interest or principal.** In that case a negotiable promissory note was taken in the face amount of $10,000.00. Of the $10,000.00 sum, $500.00 was found to be a bonus charged by the lender and $800.00 was found to represent one year's interest at 8% per annum. The Florida Supreme Court specifically held that the actual principal sum received by the borrower was only $8,700.00, and that inclusion of the $1,300.00 sum representing interest and bonus, constituted an exaction and reservation by the lender of $1,300.00, requiring deduction from the $8,700.00 actual principal sum of an amount equal to twice the $1,300 charge. A penalty of $2,600.00 was deducted, leaving a balance due of $6,100.00.

The Supreme Court of Florida in that case said:

> "In the case at bar there was a **negotiable promissory note** executed by the lender **which included in the principal sum** thereof **the concealed amount of $1,300 usurious interest,** with nothing on the face of such note to indicate that fact. **Such note in contemplation of law constitutes an exaction of the interest included in the principal sum stated in the face of the note as part of the principal.** By including such interest in the amount of the principal, **the lender,** in contemplation of law, **thereby took, reserved, and exacted such interest as effectually as if the ac-**

tual money itself to pay such usurious interest had been demanded and paid in advance to the lender.

* * *

"Therefore, not only did the lender forfeit the right to receive under his contract any interest on the actual amount loaned, because of his usurious agreement, but he also incurred, in addition thereto, the forfeiture of double the amount of the usurious interest **which in contemplation of law had already been reserved, paid or exacted from the debtor at the time the note and mortgage were signed.** This means that the lender has forfeited, in addition to all interest which he might legitimately have otherwise collected on the actual loan of $8,700, an additional sum of $2,600 as a penalty for the accomplished wrong done by the exaction made.

"This sum of $2,600 for the forfeiture is arrived at on the principle stated by Mr. Justice Ellis in Sullivan v. Thumm, supra, by doubling the usurious interest ($1,300) originally reserved, paid, or exacted. Therefore the actual amount loaned of $8,700, less all interest agreed to, less $2,600 penalty, is the proper amount of the decree that should have been entered in this case for the mortgage debt." (pp 608-609) (Emphasis added)

In 1933, the Florida Supreme Court again spoke on the point involved, in the case of **Sherman** v **Myers**, 108

Fla. 129, 146 So. 213. In that case the lender took a note and mortgage in the face amount of $40,000.00 when in fact the borrower received the principal sum of only $32,000.00. The chancellor had found this disparity and had deducted the $8,000.00 from the $40,000.00 note, ordering the $32,000.00 balance payable. Upon appeal, the Supreme Court held that the lender was required to forfeit the entire interest charged or contracted for, and in addition thereto must forfeit double the amount of interest which had been reserved, taken or exacted. The court expressly held that the inclusion in the principal of the negotiable promissory notes of the sum of $8,000.00 constituted a reservation thereof by the lender, subjecting the lender to a penalty of double the $8,000.00, and the court reversed the chancellor and ordered him to deduct from the $32,000.00 principal sum a penalty of $16,000.00, being double the $8,000.00 reserved by inclusion in the promissory notes.

The holding in **Sherman** v. **Myers**, like the holding in **Wilson** v. **Conner**, is clear and unequivocal. In each of the cited cases the trial court had found as a fact inclusion of interest or bonus in the face of a negotiable note and had forfeited that amount, but in each case the trial court had refused to take the next step, namely enforcement of the statutory penalty of double the amount of the charge. It is significant that the appellate court in each case held the matter to be one of positive law and in each instance reversed the trial court and affirmatively ordered deduction of double the interest or bonus so reserved.

The factual situation in the instant case is absolutely identical with the facts in the cited cases, and we respectfully insist that the controlling law gives the court no

alternative but to enforce the statutory penalty of double the interest and bonus reserved by the plaintiff.

In **Ross** v. **Atlas Finance Corporation** (Fla, 1934) 113 Fla. 793, 152 So. 410, Atlas brought suit to foreclose a mortgage and note in the face amount of $3,500.00. The trial court found the transaction usurious and found that the actual principal sum received was $3,150.00, with a $350.00 bonus having been charged and retained by inclusion of that sum on the face of the note. The trial court deducted double the amount of the bonus and interest, but made the deduction from the face amount of the note. On appeal by the borrower it was held that the deduction of double the amount of the bonus and interest should have been made from the sum of $3,150.00, which was the amount actually received by the borrower from the lender. The decree was ordered modified accordingly and as modified was affirmed.

Still another case directly in point is that of **Carr** v. **Cole** (Fla. 1935) 119 Fla. 260, 161 So. 392. In this case the lender advanced $8,600 and required the borrower to execute a note for $10,000.00 plus interest. The borrower had paid interest in the sum of $3,100.00, and the interest contracted for would have amounted to $4,000.00 to maturity of the note. The trial court found the transaction to be usurious and ordered the debt discharged. The Supreme Court affirmed the chancellor, finding that the loan was tainted by civil usury and holding that both the excess sum of $1,400.00 included in the note and the interest actually paid should be doubled, and forfeited to the borrower. When doubled, the $1,400.00 and the $3,100.00, totaling $9,000.00 was deducted from the actual principal sum involved of $8,600.00 and a balance of $400.00 re-

mained due to the borrower from the lender. The trial court, however, did not allow an affirmative judgment against the lender but merely declared the principal and interest forfeited and the debt discharged. This decree of the chancellor was affirmed by the Supreme Court after thorough review.

The last case squarely on this point which we discuss in this petition is **Ayvas v. Green** (Fla. 1952) 57 So. 2d 30. There are other cases also holding in accord with those cited in this petition, but we have attempted to avoid stacking citations.

In **Ayvas v. Green**, a bonus of $547.50 was included in the face principal amount of a note and the note also carried interest on its face at 6%. The special master who took the testimony found the transaction tainted by civil usury. The chancellor rejected the master's finding and entered a decree enforcing the note and mortgage involved. No payments, either of principal or interest, had been made by the borrower.

On the borrower's appeal, the court held that the trial court erred in failing to find civil usury; that by reserving a hidden bonus in addition to the apparent interest called for in the note, the lender had reserved, charged or taken interest in excess of the legal rate.

In the words of the court:

> "We hold, then, that the obligation here sought to be foreclosed was civilly usurious at its inception and that the lender must forfeit double the amount of interest 'reserved, charged, or taken,'

in accordance with the provisions of Section 687.04. Since in this case no interest payments were made by the appellants, the forfeiture will apply only to the 'bonus' reserved, to wit, $547.50 ($2700 minus $2152.50), which, when double the amount thereof is deducted from the amount actually loaned, will leave a balance due the lender, on the particular obligation here sought to be foreclosed, of $1,057.50." (p. 34)

It is significant to note that in each of the cited Florida cases, the appellate court has ordered this double deduction to be made as a positive requirement of law. The United States Court of Appeal in the instant case recognizes that if the bonus was taken or reserved by Aviation Credit Corporation the deduction of double the sum of the bonus was required. The court's failure to recognize that the interest and bonus were reserved and exacted **at the time the notes were signed** flies in the face of every reported Florida case, and must be corrected if this extremely important area of law is to remain clear in Florida commerce and finance.

The widespread public impact of any departure from earlier holdings as to usury has been recognized and cited by the Florida Supreme Court in **Nelson** v. **Scarritt Motors** (Fla. 1950) 48 So. 2d. 168. In that case the Florida court passed upon another aspect of usury and said:

"In view of these holdings and the fact that thousands of such contracts are now outstanding on the strength of them it is our view that the judgment appealed from must be and is hereby affirmed. . . ."

Already the federal courts are overburdened with work in this region. The decision of the Court of Appeals in this case is certain to increase that burden unnecessarily, with usurers wherever possible scampering to the federal jurisdiction in the hope of becoming beneficiaries of this most substantial deviation from the established law of the State of Florida.

This honorable court can and should avoid this unhappy development by granting its writ of certiorari in this cause and by bringing the federal decisions into harmony with state law as required under the Erie Railroad doctrine.

Respectfully submitted,

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I do certify that copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been furnished by mail to Smith, Ristig and Smith, to Knuck and Anderson, and to Walton, Lantaff, Schroeder, Atkins, Carson and Wahl, this 27th day of September, 1960.

Henry M. Sinclair
Attorney

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18071

CONNER AIR LINES, INC. & F. A. CONNER,

Appellants,

versus

AVIATION CREDIT CORPORATION, L. B. SMITH AIRCRAFT CORPORATION & L. B. SMITH,

Appellees,

AVIATION CREDIT CORPORATION,

Appellant,

versus

CONNER AIR LINES, INC., F. A. CONNER & JOSEPH G. MORETTI,

Appellees.

Appeals from the United States District Court for the Southern District of Florida.

(June 30, 1960.)

Before CAMERON, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Conner Air Lines owned a

DC-6 aircraft which had been outfitted for and used as a cargo carrier. Conner Air Lines, herein called Conner, desired to convert the plane into a passenger carrier. It negotiated with a number of firms for specified interior work and among the proposals was one from L. B. Smith Aircraft Corporation, herein called Smith Aircraft. Other work, in addition to that included in the initial proposal, was necessary and 100 seats had to be purchased. Conner was without funds to cover the costs of making the conversion of the aircraft from the one type of use to the other. F. A. Conner, the president and dominant personality of Conner Air Lines, discussed his problem with L. B. Smith, who, in addition to being the president of Smith Aircraft, was president of Aviation Credit Corporation, herein called Aviation Credit. Smith was the guiding genius of both of these corporations. As a result of these discussions a contract was made between Conner and Aviation Credit by which the latter undertook to advance some working capital funds to Conner, to discharge a substantial amount of Conner's existing indebtedness, and to pay for rehabilitation work on the aircraft in an amount up to, but not exceeding, $150,000. It was agreed that Conner would give Aviation Credit a bill of sale for the aircraft, and Aviation Credit would make a conditional sale contract by which Conner would reacquire title to the aircraft upon payment of $505,140.92, in accordance with the terms of a promissory note in that amount given to Aviation Credit by Conner and payable in installments over a thirty-two month period. The amount of the note was the aggregate of Aviation Credit's commitments with interest included at 11.58% computed

on reducing balances. It was expressed in the agreement that Conner would be credited with any sums not advanced or expended by Aviation Credit to or for Conner. The bill of sale, conditional sale contract and promissory note were executed and delivered on November 23, 1956. F. A. Conner individually guaranteed the payment of the note.

At or about the time of the financing arrangement made with Aviation Credit by Conner, the latter entered into a contract with Smith Aircraft for specified work to be done at the agreed price of $150,000. Before February 23, 1957, the date when the first installment payable by Conner to Aviation Credit became due, a supplemental arrangement was worked out under which Smith Aircraft would do additional work on the Conner plane for stated sums. Conner agreed to increase the amount which it had previously agreed to pay for portions of the work which Smith Aircraft had undertaken to do by its original contract. It was claimed by Smith Aircraft that this additional amount was an adjustment made to offset charges incurred by it caused by failures and delays in performance by Conner of its contract promises. Conner asserted that the additional amount was a financing bonus. Aviation Credit agreed to finance the revised deal between Conner and Smith Aircraft and to extend the first four installments. A supplemental agreement was executed and an additional note was given and interest at the rate of 11.58% was included in the amount.

Conner defaulted in its payments to Smith Aircraft. The United States attached the aircraft for the lien

of taxes claimed to be owing by Conner. Smith Aircraft was required to make disbursements for insurance, maintenance costs and to prevent the repossession of radio equipment installed on the aircraft. Aviation Credit gave notice of an intention to repossess the aircraft under the terms of its so-called conditional sale contract and brought suit for a declaration that it was the owner of the aircraft and that Conner had no interest therein. While the suit was pending Smith Aircraft, by amendment, prayed for foreclosure in the event the conditional sale contract should be held to be a mortgage. Conner and F. A. Conner individually asserted that the agreements had been procured through the fraud of Smith Aircraft and Aviation Credit and that usury had been exacted. A mortgage lien was asserted by F. A. Conner, and another by Joseph G. Moretti. The United States asserted its claims for taxes. Testimony was taken over a period of six days.

The district court held that the bill of sale, the conditional sale contract, and the supplemental instruments constituted a mortgage under the provisions of a Florida statute.[1] It was found that, although Smith Aircraft and

[1] All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

Provided however, that no such conveyance shall be deemed or held to be a mortgage, as against a bona fide purchaser or mortgagee for value without notice, holding under the grantee. Fla. Stat. Ann. § 697.01.

Aviation Credit were separate legal entities with different managing officers, they were both under the control and domination of L. B. Smith who, in all material matters, acted for these corporations in the transactions with Conner. The control and relationship was such, as found the district court, that all information on the part of one was information on the part of the other. Of the amounts included in the renegotiated and supplemental agreement, the court found that $33,310.18 was a bonus, and that the bonus added to the interest computed at the 11.58% rate and included in the notes resulted in a charge exceeding the permissive 15% rate and hence constituted usury under the Florida law. The court found that Aviation Credit had advanced $459,083.58, exclusive of the bonus payment. It was found that Aviation Credit had advanced $9,703.99 for the preservation, maintenance and protection of the res. The court held Aviation Credit was entitled to recover this amount with interest at the statutory rate of 6%. It was concluded by the court that Aviation Credit was entitled to recover for the sums actually advanced, without interest or bonus, and less twice the sum of said bonus. It was held that Aviation Credit should be awarded an attorney's fee of $15,000, with the court expressing the opinion that "this charge is reduced from the normal because of the overcharge demands." The court's findings and conclusions were followed by a decree of foreclosure and sale.

Aviation Credit has appealed. It asserts that the bonus, so called, was not a financing bonus but a renegotiation

of a contract between Smith Aircraft and Conner under which Smith Aircraft would otherwise have sustained a loss. It contends that the two corporations, related though they were through the domination of L. B. Smith, were nevertheless separate, and a sum contracted for as a profit by one should not be credited to the other as a usurious exaction. Aviation Credit contends that, assuming there was usury, the court misapplied the Florida usury statute in the imposition of the penalty. Finally, it is said the appellant was entitled to, but was not allowed, a reasonable attorney's fee. Conner and F. A. Conner individually take an appeal and assert that the amount of the penalty for usury as found and imposed by the court was less than the Florida statutory provision requires.

A Florida statute[2] passed in 1925 prohibited corporations from interposing the defense of usury. This provision was repealed[3] in 1953, and the defense of usury then became available to corporations as well as to individuals. *Sodi, Inc. v. Salitan*, Fla. 68 So. 2d 882.

The transaction which was found by the district court to make a usurious transaction was the inclusion of the item of $33,310.18 in the supplementary agreement. The appellant urges that this sum, which Conner agreed to pay, was a profit to Smith Aircraft for work done and to be done by it, and that even though the profit be unreasonable it does not follow that it should be treated as usury so far as Aviation Credit is concerned. Authorities are

2 Laws of Fla. Acts of 1925, Ch. 10096.
3 Laws of Fla. Acts of 1953, Ch. 28170.

cited showing it to be the law of Florida that the difference between a cash price offered and a credit price agreed upon is not to be regarded as interest so as to invoke the application of the law against usury. *Dillon v. J. W. Walter Co.*, Fla. 98 So. 2d 391. But here our problem is not that simple. When the supplemental agreement was made Smith Aircraft had performed a part of the work it had undertaken to do and it was obligated to perform the rest. There was to be a forbearance by Aviation Credit of the then maturing installments of Conner's indebtedness. Other financing was undertaken. Smith Aircraft and Aviation Credit were both represented by L. B. Smith and there is no doubt but that he was authorized to speak for both. The district court found that the $33,310.18 was to be paid as a financing bonus. We cannot say that the facts do not admit of this inference or that the finding is erroneous.

Where there is an intent on the part of a lender to make a loan or to extend a maturity for a greater profit than is permitted by law, the transaction is tainted with usury even though it is cast in a form which was designed to give it a cloak of apparent legality. Courts do not permit the use of design or device to evade the purpose of the usury laws. *Griffin v. Kelly*, Fla. 92 So. 2d 515; *Beacham v. Carr*, 122 Fla. 736; 166 So. 456. The amount of a bonus exacted in connection with financing will be regarded as interest in determining whether the usury law has been violated, and this is true whether the bonus inures to the benefit of the lender, the agent of the lender, or to the benefit of another. *Speier v. Mounah Park Block Co.*, Fla. 84 So. 2d 697; *Stoutamire v. North Florida Loan Associa-*

tion, 152 Fla. 321, 11 So. 2d 570; *Richter Jewelry Co. v. Schweinert*, 125 Fla. 199, 169 So. 750; *Hopkins v. Otto*, 118 Fla. 865, 160 So. 203. The fact that Smith Aircraft and Aviation Credit are separate corporate entities does not prevent the financing bonus from being treated as a usurious exaction in view of the relationship, through L. B. Smith, of the two companies.

In computing the amount which Smith Aviation is entitled to recover, the district court took the amount of the advances made pursuant to the agreement, excluding the bonus, added the amounts paid out for preservation, maintenance and protection with interest on this latter amount. The aggregate of these items was $469,266.52. The district court, in its findings and conclusions, some times referred to the $33,310.18 item as a bonus and at other times as an overcharge. In the decree the court directed that twice the amount of the $33,310.18 item be deducted. This deduction is asserted by the appellants to be unauthorized by the law of Florida.

Two sections of the Florida statutes require our consideration. These are:

> "Unlawful rates of interest defined; proviso.-It shall be usury and unlawful for any person, or for any agent, officer or other representative or any person, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, except upon an obligation of a corporation, a rate of interest greater than ten per cent

per annum, either directly or indirectly, by way of commission for advances, discounts, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten per cent; and such transactions with a corporation shall, whereby the corporation pays interest, be usury and unlawful if for a rate of interest greater than fifteen per cent per annum. The provisions of this section shall not apply to sales of bonds in excess of one hundred dollars and mortgages securing the same, or money loaned on bonds." Fla. Stat. Ann. § 687.03.

"Penalty for usury; not to apply to transferee of negotiable paper unless usury appears on face.- Any person, or any agent, officer or other representative of any person, willfully violating the provisions of §687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person, who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of in-

> terest so reserved, taken or exacted; provided, however, that this shall not apply to a bona fide endorsee or transferee of negotiable paper purchased before maturity, unless the usurious character should appear upon its face, or that the said endorsee or transferee shall have had actual notice of the same before the purchase of such paper, but in such event double the amount of such usurious interest may be recovered after payment, by action against the party originally exacting the same, in any court of competent jurisdiction in this state, together with an attorney's fee, as provided in Sec. 687.06." Fla. Stat. Ann. § 687.04.

If it is correct to say that the $33,310.18 was taken or reserved, or has been paid by Conner, then the imposition by the court of double the amount of the usurious bonus from the true principal was proper. If there was not any payment, or any taking or reserving of usurious interest, then the full amount of the principal, without interest, may be recovered. *Wilson v. Conner*, 106 Fla. 6, 142 So. 606; *Ross v. Atlas Finance Corporation*, 113 Fla. 793, 152 So. 410; *McGillick v. Chapman*, 134 Fla. 220, 184 So. 26. Where other instruments are executed contemporaneously with a mortgage and as a part of the same transaction, the mortgage may be modified by the other instruments, and all documents are to be read together in order to determine and give effect to the intention of the parties. 59 C.J.S. 208, Mortgages, § 156; *Jackson v. Parker*, 153 Fla. 622, 15 So. 2d 451; *Brumick v. Morris*, 131 Fla. 46, 178 So. 564; *Morrow v. Commonwealth Life In-*

surance Co., 118 Fla. 371, 159 So. 525. The effect of the transactions between Conner, Smith Aircraft and Aviation Credit, was to have conversion and rehabilitation work done by Smith Aircraft on the DC-6 plane of Conner and to provide that payments for this work and other payments and advances for other purposes of Conner should thereafter be made by Aviation Credit and be secured by a lien on the Conner aircraft. These arrangements resulted in a mortgage to secure future advances. Such security transactions are recognized and enforced in Florida.[4] It may be parenthetically noted that there is no question now present in this case as to lien priorities. Cf. *United States v. American National Bank*, 5th Cir. 1958, 255 F. 2d 504, cert. den., 358 U.S. 835, 79 S. Ct. 58, 3 L. Ed. 2d 72, reh. den. 359 U.S. 1006, 79 S. Ct. 1135, 3 L. Ed. 2d 1034. The advances by Aviation Credit were made over a period of about fourteen months.

The provision for the forfeiture of double the amount of the interest exists only if the usurious interest has been paid or has been taken or reserved. Certainly Conner did not pay the so-called bonus to Aviation Credit. Was it otherwise paid, taken or reserved? It was not, unless it can be said that a paying, taking or reserving resulted from the transfer of the amount of the bonus from Aviation Credit to Smith Aircraft. The undertaking of Conner to pay Aviation Credit the $33,310.18 constituted usury, but only because of the relationship between the two Smith corporations. By reason of that same relation-

[4] Fla. Stat. Ann. § 697.04

ship we are precluded from saying that the transfer by one of them to the other is the paying, taking or reserving of the usurious bonus. Because of the relationship, it follows that the situation is no different than if Conner had agreed to pay, but did not pay, the sum to Aviation Credit as additional interest or as a financing bonus. The interjection of the related company, Smith Aircraft, into the arrangement does not change the effect of what was done in so far as concerns the payment by Conner, or the taking or reserving by Smith Aircraft, of the bonus. Hence we reach the conclusion that it was error to determine, as the district court determined, that the bonus of $33,310.18 was paid or taken or reserved.

Smith Aviation appeals from that portion of the court's decree fixing the amount of attorneys' fees awarded to it. In its finding the district court said, "It is the court's opinion that a reasonable attorneys' fee to be awarded to the plaintiff and as against the defendant in this case should be the sum of $15,000.00, this charge is reduced from the normal because of the overcharge demands." It is apparent that the court's phrase "overcharge demands" has reference to the usurious financing bonus of $33,310.18. The statute relating to usury fixes the forfeitures for usury. Where a mortgagee is entitled to foreclose and the mortgage provides for attorneys' fees, the presence of usury will not prevent the recovery of a reasonable attorneys' fee. *Purvis v. Frink*, 57 Fla. 519, 49 So. 1023; *Skinner v. Southern Home Building & Loan Association*, 46 Fla. 547, 35 So. 67. While equitable considerations may be a factor in the determination of a reasonable attorneys' fee, there should not be a reduction from what would

otherwise be reasonable because of conduct for which a specific statutory penalty has been provided and imposed. The amount of a reasonable attorneys' fee to be awarded to Smith Aviation should be reconsidered in the light of what we have here said and decided.

By its appeal, Conner urges that the court should have taken the face of the notes, deducted the amount found to be the true principal and treated the difference as usurious interest reserved by Smith Aircraft. This contention is pretty well disposed of, we think, by what we have heretofore said. It has already been resolved that the transaction was one creating a mortgage to secure future advances. The agreement between Conner and Aviation Credit expressly provided that the stated principal sum should be credited by any sums included therein which were not advanced by Aviation Credit or expended by it on behalf of Conner. We think the contentions made by the appeal of Conner are without merit.

The conclusions here reached are that Aviation Credit is entitled to recover the principal of its advances to or for Conner pursuant to their agreement which the district court has found to be $459,083.58, the amount paid for the preservation, maintenance and protection of the aircraft with interest on such payments, a reasonable attorneys' fee to be determined without diminution because of the usurious aspects of the transactions, and appropriate costs, including costs on this appeal. To carry out

the conclusions here reached the judgment of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED

APPENDIX B

JUDGMENT.

Extract from the Minutes of June 30, 1960.

CONNER AIR LINES, INC. & F. A. CONNER,

versus

AVIATION CREDIT CORPORATION, L. B. SMITH AIRCRAFT CORPORATION & L. B. SMITH.

No. 18071.

AVIATION CREDIT CORPORATION,

versus

CONNER AIR LINES, INC., F. A. CONNER & JOSEPH G. MORETTI.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in order to carry out the conclusions reached in the opinion of this Court;

It is further ordered and adjudged that the appellants, Conner Air Lines, Inc., and F. A. Conner, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18,071

CONNER AIR LINES, INC. & F. A. CONNER,
Appellants.

versus

AVIATION CREDIT CORPORATION, L. B. SMITH AIRCRAFT CORPORATION & L. B. SMITH.
Appellees.

AVIATION CREDIT CORPORATION,
Appellant,

versus

CONNER AIR LINES, INC., F. A. CONNER & JOSEPH G. MORETTI,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

—August 12, 1960—

ON PETITIONS FOR REHEARING

Before CAMERON, JONES and BROWN, Circuit Judges.

PER CURIAM:

IT IS ORDERED That the Petitions for Rehearing in the above entitled and numbered cause be, and they are hereby DENIED.

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Office-Supreme Court, U.S.
FILED
OCT 11 1960
JAMES R. BROWNING, Clerk

No. 452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

CONNER AIR LINES, INC. AND F. A. CONNER, *Petitioners*

v.

AVIATION CREDIT CORPORATION, L. B. SMITH AIRCRAFT CORPORATION, and L. B. SMITH, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ADDITIONAL STATEMENT OF THE CASE

The facts of the case are as substantially set forth in the Opinion of the Court of Appeals (Petition, App. 1-14).

Briefly, the transaction between the parties involved a financing agreement wherein Respondent, Aviation Credit Corporation (hereinafter referred to as "Aviation Credit") agreed to advance certain specified moneys in the future to Petitioner, Conner Air Lines,

Inc. (hereinafter referred to as "Conner"), to pay for certain conversion and rehabilitation work on a DC-6 aircraft owned by Conner and to also pay certain obligations already incurred or which were contemplated to be incurred by Conner, the conversion and rehabilitation work on the aircraft having been contracted for by Conner with Respondent, L. B. Smith Aircraft Corporation (hereinafter referred to as "Smith Aircraft"), a corporation affiliated with Aviation Credit Corporation through common directors, officers and stockholders, and said advances were to be secured by a lien in favor of Aviation Credit on the DC-6 aircraft by way of a conditional sales contract, treated by the Trial Court as a mortgage (Plaintiff's Exh. 1, R. 62-70). This initial financing agreement specifically provided in paragraph 9a thereof that Conner would be credited with any sums which were not advanced by Aviation Credit or expended by Aviation Credit on behalf of Conner (Plaintiff's Exh. 1, R. 69). This specific provision was included because it was impossible to know in advance exactly the amount of money which would be advanced and when, and this evidences the specific intention of the parties to adjust the principal sums and interest accordingly. The Trial Court found that in accordance with this provision Conner was advised by Aviation Credit at the time of default that due credit would be given and adjustments made on the various notes and mortgage for unearned interest and principal sums not advanced (Finding No. 14, R. 111). Simultaneously with the execution of the financing agreement, Conner executed and delivered to Aviation Credit its note (R. 17) calling for payment of principal and interest covering the moneys agreed to be advanced by Aviation Credit, including $150,000 to pay

Smith Aircraft for work on the aircraft as contracted for by Conner. The payments under the note were to be made over a period of thirty-two months, and interest was included in said installments at the rate of 11.58% per annum computed on reducing balances (a legal rate for corporations in Florida), and calculated as close as possible to the dates when moneys would be advanced by Aviation Credit. Prior to the date when the first installment on the aforesaid note was due, an arrangement was worked out whereby Smith Aircraft agreed with Conner to do additional work on the aircraft and Conner agreed to increase the price for the interior work on the aircraft covered by the original contract with Smith Aircraft because of the unexpected delays and increased labor hours on this interior work. Aviation Credit agreed to finance the revised deal between Conner and Smith Aircraft, and an appropriate supplemental finance agreement was executed to cover the additional work, increased price, and extension of four (4) installments (Plaintiff's Exh. 16, R. 85), and a supplemental note (Exh. H, R. 88) was given and again interest at the rate of 11.58% per annum on a reducing balance was included. Conner also subsequently executed and delivered to Aviation Credit a third supplemental note (R. 74) to cover additional moneys advanced by Aviation Credit and again interest at the rate of 11.58% on a reducing balance was included. All notes were secured by the lien of the conditional sales contract on the aircraft, treated by the Trial Court as a mortgage. All notes were likewise subject to the adjustment provision of the original finance agreement.

Aviation Credit actually advanced to Conner or for its benefit the total principal sum of $492,393.68, of

which amount $223,733.55 was actually paid to Smith Aircraft as Conner's agreed price for the work performed by Smith Aircraft on the aircraft. Aviation Credit also advanced an additional $9,703.99 to protect its interest under its lien on the aircraft.

Aviation Credit, in a suit under the provisions of Title 28 U.S.C. Section 2410, to originally quiet title of said aircraft by virtue of the conditional sales contract but amended at trial to a foreclosure suit by reason of the Trial Court's treatment of the conditional sales contract as a chattel mortgage, sought to recover only the moneys actually advanced by it to or on behalf of Conner, to-wit, the sum of $492,393.68 with interest at the rate of 11.58% per annum from the actual date each portion of said total sum was advanced, plus the sum of $9,703.99 advanced to third parties to protect its lien, with interest at the legal rate of 6% per annum from the date of actual advancement. *The claim of Aviation Credit, therefore, was not based on the face amount of the notes, but based upon the notes as adjusted under the terms of the finance agreement. Conner has never paid any portion of the moneys advanced nor any interest thereon.*

Included in the $223,733.55 paid by Aviation Credit to Smith Aircraft on behalf of Conner for work performed on the aircraft, was the sum of $73,733.55 to cover the additional work on the aircraft and the increased price of the interior work as agreed upon between Conner and Smith Aircraft, which additional amount Aviation Credit agreed to finance in accordance with the supplemental agreement. Of the aforesaid amount of $73,733.55, the amount of $33,310.18 was for the agreed increased price on the interior work on the aircraft.

There was no finding by the Trial Court that the original financing agreement, involving the original note, was in any respect usurious and the clear implication of the findings is that it was not. However, with respect to the supplemental transaction involving the additional work on the aircraft and the increased price of the interior, totaling $73,733.55, the Trial Court found that the increased price for the interior work in the sum of $33,310.18 was a charge over and above the reasonable charges for profits and the value of materials and services furnished by Smith Aircraft for work on the aircraft. The Trial Court then termed this overcharge as a bonus for the loan or advance of money (Finding No. 16, R. 112), and then by some legerdemain visited this bonus upon the lender, Aviation Credit, and held that this sum of $33,310.18 when added to the interest of 11.58% per annum claimed by Aviation Credit constituted a civilly usurious charge in excess of 15% per annum, contrary to the Florida statutes (Section 687.03, Florida Statutes 1955). The Trial Court then, upon the basis of such finding, decreed that Aviation Credit was entitled to recover the balance of $459,083.50 ($492,393.68 less $33,310.18 equals $459,083.50) without interest (Finding No. 17(2), R. 112). In the final decree, however, the Trial Court, applying the second penalty provision of the Florida Usury Statute (Section 687.04, Florida Statutes 1955), doubled the alleged bonus for financing of $33,310.18 and deducted this doubled amount of $66,620.36 from the balance of $459,083.50 and decided that under its financing agreement Aviation Credit should recover only $392,463.14 without interest (R. 136). Thus the Trial Court trebled the alleged bonus of $33,310.18.

Both Petitioners and Respondent Aviation Credit appealed the Trial Court's decision to the Court of Appeals.

The Respondent, Aviation Credit, claimed that the Trial Court was in error in finding a bonus of $33,310.18 representing unreasonable profits of the repairman, Smith Aircraft, principally when there was no evidence in the record by which the Trial Court could measure the difference between a fair profit and an unreasonable profit, and then visit this unreasonable profit as a bonus for financing upon the lender, Aviation Credit, to constitute a usurious transaction, so as to disallow recovery of this amount as well as to disallow all claimed interest under the first penalty provision of the Florida Usury Statute (Section 687.04, Florida Statutes, 1955). Aviation Credit further complained of the Trial Court's doubling the alleged bonus in application of the second penalty provision of the Florida Usury Statute (Section 687.04, Florida Statutes, 1955).

The Petitioners limited their appeal to the Court of Appeals to a single question of law; that is whether under the facts as found by the Trial Court, Aviation Credit had taken or reserved or had been paid interest included in the promissory notes within the meaning of the Florida Usury Statute (Section 687.04, Florida Statutes, 1955) so as to inflict the second of the two alternative penalties provided therein (R. 149).

The Court of Appeals, applying the Florida law to the facts before it, agreed with Respondent, Aviation Credit, that the bonus of $33,310.18 had not been "taken or reserved or been paid" within the meaning of the second penalty provision of the Florida Usury Statute

Section 687.04, Florida Statutes, 1955), and that, therefore, the Trial Court was in error in reducing the recovery of Aviation Credit by doubling the bonus, and accordingly restored to Aviation Credit's recovery, the principal amount of $66,620.36, affirming, however, the Trial Court's single deduction of $33,310.18 as usurious interest under the first penalty provision of the Florida Usury Statute (Section 687.04, Florida Statutes, 1955).[1] The Court of Appeals, further applying the Florida law to the facts before it, held Petitioners' appeal to be without merit on the basis that the interest included in the promissory notes or as claimed by Aviation Credit had not been taken or reserved or paid within the meaning of the second penalty provision of the Florida Usury Statute (Section 687.04, Florida Statute, 1955) and that, therefore, Aviation Credit's recovery should not be further reduced by double this claimed interest (Petition, App. 1-14).

The Petitioners seek to review the Court of Appeals' decision to restore the doubled bonus amount of $66,620.36 to Aviation Credit's recovery as well as the refusal to further reduce Aviation Credit's recovery by twice the amount of the interest included in the notes by applying the second penalty provision of the Florida Usury Statutes (Section 687.04, Florida Statutes, 1955).

The question presented for review by Petitioners, as well as Petitioners' statement of the case, ignores com-

[1] This was despite the fact that the Trial Court had no competent evidence before it to hold that the $33,310.18 additional agreed price for the initial work on the aircraft represented unreasonable profits to the repairman, Smith Aircraft, without which finding there could not have been a finding of usury in this case.

pletely the undisputed facts, as found by the Trial Court and affirmed by the Appellate Court, that the notes were to cover future advances, with provision for adjustment under a basic financing agreement, and were not intended to be payable absolutely according to their face amounts, and the further fact that Aviation Credit's suit was not on the face amount of the notes but was solely for the moneys actually advanced with interest at a legal rate of 11.58%, from the dates of actual advancement of such monies.

ACTUAL QUESTION PRESENTED FOR REVIEW

In view of the additional statement of the case as aforesaid, Respondents respectfully submit that the question presented for review is not as set forth by Petitioners (Petition, p. 2) but is actually as follows:

> Where a borrower and a lender in a Florida transaction (1) enter into a financing contract whereby money is to be advanced over a period of several months, (2) estimate the prospective dates of the contemplated advancements and calculate interest to maturity at a legal rate, (3) include in negotiable notes and mortgages given to secure such future advances, the total amount of such estimated principal and interest, (4) agree that the borrower shall be given credit for amounts not advanced as contemplated and unearned interest, (5) execute and deliver all instruments simultaneously as one transaction, (6) make and accept actual advancements of $492,393.68 in strict compliance with the agreements, and (7) upon default, the borrower having paid nothing on principal or interest, the lender forecloses upon the security seeking recovery only of the actual sums advanced

with interest only from the dates of each such advancement, does the fact, that the Trial Court found that $33,310.18 of the $492,393.68 actually paid out by the lender for the borrower was a "bonus" which when added to the interest claimed constituted civil usury, require, under the Florida Usury Statute, the forfeiture of the interest and the bonus as determined by the Court of Appeals, or additionally, the forfeiture of double the bonus and the interest.

REASONS WHY WRIT SHOULD NOT BE GRANTED

Respondents respectfully submit that the Writ should not be granted for the following reasons:

1. The United States Supreme Court ordinarily accepts the determinations of the Courts of Appeals on question of local law.

2. The decision of the Court of Appeals is not in conflict with the Florida law as asserted by Petitioners, but on the contrary follows the law implicitly.

ARGUMENT

I.

The United States Supreme Court Ordinarily Accepts the Determinations of the Courts of Appeals on Questions of Local Law

The Court of Appeals, in its decision, interpreted the Florida Usury Statute, Section 687.04, Florida Statutes, 1955, of which interpretation Petitioners seek the review of this Court.

This Court has consistently held that it will ordinarily accept the determinations of the Courts of Appeals on questions of local law.

In the case of *General Box Company* v. *United States*, 351 U.S. 159, 76 S. Ct. 728, 100 L. Ed. 1055 (1956), involving an action to recover damages for the value of timber on the Mississippi River destroyed by a government contractor, an interpretation of the Louisiana law with respect to the notice required of the State in connection with exercising its rights under a riparian servitude was before the Court. The Court of Appeals had held, based upon its analysis of the Louisiana law, that prior notice to the petitioner was not a prerequisite to an appropriation of its timber for levee purposes. This Court said, at page 165:

> "We ordinarily accept the determinations of the Courts of Appeals on questions of local law, and we do so here. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 534, 69 S. Ct. 1233, 1235, 93 L. Ed. 1520; Huddleston v. Dwyer, 322 U.S. 232, 237, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246."

And in the case of *County of Allegheny* v. *Frank Mashuda Company*, 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d. 1163 (1959), involving an action for easter challenging the validity of the taking of plaintiff's property, an interpretation of the Pennsylvania law with respect to condemnation rights was before the Court. The Court of Appeals had interpreted the Pennsylvania law and the petitioner was challenging the same. This Court said, at pages 190-191:

> "It is perfectly clear under Pennsylvania law that the respondents could have challenged the validity of the taking, on the ground that it was not for public purposes, in a suit brought in a Court of Common Pleas independent of the damage proceedings pending on appeal from the Board of Viewers. The Court of Appeals' opinion instructs us as to the state procedure which would have applied if

respondents had chosen the state forum: 'These [Pennsylvania] authorities establish the propriety, if not the necessity, of testing the validity of a condemnation in a proceeding in the Pennsylvania courts independent of that in which compensation is awarded. * * *

"We, of course, usually accept state law as found by the Court of Appeals, see Propper v. Clark, 337 U.S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480; The Tungus v. Skovgaard, 358 U.S. 588, 596, 79 S. Ct. 503, 508, 3 L. Ed. 2d. 524, and we have no hesitancy in doing so here where there is no indication that its conclusion as to the state law is not correct."

As demonstrated in the succeeding portion of this Brief, it is respectfully submitted that the Court of Appeals correctly interpreted and applied the Florida Usury law to the facts of this case, in which circumstance, this Court should not therefore disturb the same.

II.

The Decision of the Court of Appeals Is Not in Conflict With the Florida Law as Asserted by Petitioners, But on the Contrary Follows the State Law Implicitly

The opinion of the Court of Appeals (Petition, App. A) is in full accord with the Florida Usury Statute and State decisions construing same. Petitioners and Respondents relied upon the identical Florida decisions in the Court of Appeals, and differed only as to their application to the admitted facts in this case.

Section 687.04, Florida Statutes, 1955, provides the penalty for violating the civil usury statute (See 687.03). It provides two distinctly separate penalties.

The first is that the lender "shall forfeit the entire interest so charged, or contracted to be charged or

reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity."

The second portion of the statute provides: "* * * and when said usurious interest *is taken or reserved, or has been paid*, then and in that event the person who has *taken or reserved, or has been paid*, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest *has been reserved, taken or exacted* in any way, double the amount of *interest so reserved, taken or exacted*: * * *" (Emphasis supplied).

It is crystal clear from the first quoted portion of the statute that the actual principal sum of the usurious contract may be recovered by the lender and that he forfeits only the interest where he makes a contract to charge or reserve more than 15% from a corporate borrower. (This is the penalty held applicable by the Court of Appeals decision.)

It is also clear from the second quoted portion of the statute that only when usurious interest is taken or reserved in advance or been paid does the lender forfeit double the amount of bonus or interest so withheld or paid. (This is the penalty contended for by Petitioners.)

The Supreme Court of Florida has expounded on and explained the difference between the two penalty provisions of Section 687.04, Florida Statutes. In the leading case of *Wilson* v. *Conner*, 106 Fla. 6, 142 So. 606 (1932), cited by Petitioners, which will be more fully discussed hereinafter, Justice Davis at page 608 had this to say about these two penalty provisions:

"In this connection it must be observed the statutes make a distinction between the consequences which follow usurious interest 'taken', 'reserved' or 'paid' in contemplation of law, as distinguished from the mere entering into an agreement for the 'taking', 'reserving' or 'paying' of usury, but under which latter kind of agreement no usury is actually 'taken', 'reserved' or 'paid' at the time of the usurious contract, or thereafter in the course of its performance.

"Accordingly, under Section 6939 C.G.L., supra [predecessor to Section 687.04, Florida Statutes], the penalty for merely entering into an agreement for usurious interest is that such interest cannot be enforced in any court in any kind of action. On the other hand, the penalty for *actually taking, reserving, or exacting* usurious interest is forfeiture of double the 'amount of interest so reserved, taken or exacted'.

"The reason for this distinction as to penalty is not hard to ascertain. To exact a mere promise from the borrower to pay interest which the lender will have to enforce through judicial proceedings to which the defense of usury may be interposed, and thereby defeat the accomplishment of the wrong *before it is consummated by* realization of its illegal fruits, is undoubtedly less reprehensible and less burdensome to the borrower than when he is compelled to enter into an obligation by which the usurious interest is in effect *taken, reserved, or paid in advance* by means of the device, contrivance, or agreement under which the borrower is obligated to pay and the lender secured in the enforcement of the obligation. The latter kind of device requires affirmative steps to be taken by the borrower to secure relief from the usurious interest which in the first instance he can evade by merely interposing a defense, if, as, and when the lender pursues him.

"We hold, therefore, that any person wilfully violating the usury law by means of any contract, contrivance, or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the *actual principal sum received*, together with interest at the rate of 10 per cent per annum thereon, must forfeit the entire interest so charged, or contracted to be charged or reserved, and that in such cases only the *actual principal sum* of such usurious contract will be enforced in any court of this State, either at law or in equity, *but* we are also of the opinion that when said usurious interest is not only contracted for, but is *taken, reserved, or has been paid* by means of the device employed for that purpose, then and in that event, as is provided by Section 6939 C.G.L., supra, the violator forfeits to the party from whom such usurious interest *has been in fact taken, reserved, or exacted* double the amount of interest so reserved, taken or exacted. (Emphasis supplied)"

It will be specifically noted that the words "taken", "reserved", "paid" and "exacted" as used in the second penalty provision of Section 687.04, Florida Statutes, are all in the past tense. In other words, there must be an actually accomplished fact of taking, reserving, paying, or exacting of usurious interest before this particular double penalty is inflicted. The word "reserved" is defined as "retained; kept; kept back; not delivered; withheld." (See Webster's New International Dictionary, Second Edition, Unabridged).

It is, therefore, also crystal clear that the second penalty provision only applies and is inflicted on a lender *wilfully* violating Section 687.03, Florida Statutes, *where the borrower has actually paid usurious interest or where the lender has retained or kept back or not delivered to the borrower the full amount of the*

principal of the loan so that in legal effect the lender has reserved or been paid in advance the usurious interest to the same effect as if the borrower had actually paid such usurious interest to the lender.

The above interpretation of the second penalty provision of Section 687.04, Florida Statutes, is specifically borne out by all the decisions cited by Petitioners. They persist, however, in misunderstanding the interpretation of the words "taken or reserved" as used in said statute and are attempting to mislead this Court by claiming support for their position in the cases cited in their Petition, when a careful reading of said cases clearly demonstrates just the opposite, i.e., nonsupport of their position, while completely and succinctly supporting the decision of the Court of Appeals. Accordingly, the recognized law of Florida interpreting the Florida Usury Statute does not support the Petitioners' contention as set forth in their Petition (Petition, pp. 7-14).

In *Wilson* v. *Conner*, supra, the borrower signed a $10,000 mortgage note payable in two years with 8% interest per annum payable semi-annually in advance. The lender only turned over to the borrower the sum of $8,447.75 reserving $1,552.25 in advance, which sum of $1,552.25 consisted of (1) $800.00 interest in advance for one year at 8% on $10,000.00; (2) $500.00 bonus for making the loan; and (3) $252.25 for expenses of making the loan. The court held that the $252.25 was for legitimate expenses, but that the $800.00 advance interest and the $500.00 bonus was also interest and that, therefore, the borrower had only received $8,700.00 of the $10,000.00 principal signed for, making a fictitious amount of $1,300.00 which the lender had actually

"reserved, taken or exacted". The borrower had not paid any part of the principal or interest to the lender. The Court found that the $800.00 advance interest collected plus the $500.00 bonus or $1,300.00 was usurious. The Court thereupon decreed that the borrower could not collect any part of the 8% interest called for by the $10,000.00 note, and because the lender had taken or reserved $1,300.00 in advance, also deducted twice the amount of $1,300.00 or $2,600.00 from the principal of $8,700.00 actually loaned, giving the borrower a judgment for $6,100.00. The Court, however, did not double the interest called for in the note because it had not been taken, reserved, or paid. Thus, the Court only applied the second penalty provision to the $1,300.00 which had been taken or reserved in advance by the lender. The Court said on page 609:

> "In the case at bar we have held that $8,700 was the actual amount loaned. The interest exacted on this sum amounted to $1,300 for the first year, and is plainly usurious under Section 6939, C.G.L., supra. All of the agreed future interest provided for in the contract was at the outset also legally forfeited through the mere attempt to charge it, regardless of whether any of it was even 'taken or reserved' or 'paid' at that time or not.
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> "Therefore, not only did the lender forfeit the right to receive under his contract *any interest on the actual amount loaned*, because of his usurious agreement, but he also incurred, in addition thereto, the forfeiture of double the amount of the usurious interest which in contemplation of law *had already been reserved, paid, or exacted* from the debtor at the time the note and mortgage were signed. This means that the lender has forfeited, in addition to all interest which he might legitimately have otherwise collected on the actual loan of $8,700, an

additional sum of $2,600 as a penalty for the *accomplished wrong done by the exaction made.* (Emphasis supplied)"

It is clear that the above case does not stand for the proposition asserted by the Petitioners in their Petition to the effect that the Court should also inflict the double penalty as to the interest in the original and supplemental notes, which was never paid by Petitioners and which was never "taken, reserved, retained, kept, kept back, not delivered, withheld, or exacted" by Aviation Credit, and in fact not even claimed or sued for by Aviation Credit, its suit being for interest at 11.58%, on the principal sums advanced from the dates of advancement, and not for the interest in the said original and supplemental notes. In fact, it is extremely clear that the case supports entirely the position of Aviation Credit that said agreed future interest, either based on the notes or as claimed and sued for, is merely forfeited and not doubled as claimed by Petitioners.

In the case of *Sherman* v. *Myers*, 108 Fla. 129, 146 So. 213 (1933), cited by Petitioners, the mortgagor-borrower signed a note for $40,000.00 payable in three (3) years with interest at 8% per annum. The borrower only received $32,000.00 out of the principal of $40,000.00 signed for. The borrower during the course of performing on the note also paid $4,200.00 in actual interest payments at the rate of 8% on the $40,000.00 as called for in the note. The chancellor in the lower court doubled the $4,200.00 interest actually paid or $8,400.00, which he deducted from the principal sum of $32,000.00 actually advanced by the borrower, but only eliminated the $8,000.00 "interest" reserved in advance or withheld, retained, or kept by the borrower.

The Florida Supreme Court in following the principle laid down by *Wilson* v. *Conner*, supra, held that the $8,000.00 reserved or taken in advance by the borrower should also be doubled under the second penalty provision of the Florida Usury Statute. Thus, we see again that the double penalty provision of the usury statute is only to be inflicted where the borrower has in fact actually "taken, reserved, retained, kept back, not delivered, withheld, exacted or been paid" the usurious interest. The Court did not, as claimed by Petitioners herein, inflict the double penalty on any interest which the borrower merely charged or contracted to charge or exact and which had not in fact actually been "taken, reserved, paid or exacted".

In the case of *Ross* v. *Atlas Finance Corporation*, 133 Fla. 793, 152 So. 110 (1934), cited by Petitioners, the mortgage note signed by the borrower was for $3,500.00 but the actual principal sum advanced by the lender was $3,150.00. The court held that double the amount of the bonus *charged and retained plus interest paid* should be deducted from $3,150.00 the actual principal advanced, rather than from the face of the note. Again, it is clear that this cited case does not stand for the proposition espoused by Petitioners.

In the case of *Carr* v. *Cole*, 119 Fla. 260, 161 So. 392 (1935), cited by Petitioners, the mortgage borrower signed a note for $10,000.00 payable in five years with 8% interest per annum from date. The borrower actually only received $8,000.00 of the principal sum of $10,000.00 signed for. The borrower had also paid interest of $3,100.00. The court held that for the use of $8,000.00 for five years, the lender exacted a return of $5,100.00 plus the principal sum originally advanced

of $8,000,000 and thus calls for 12½% interest per annum. The court doubled the $1,000,000 reserved in advance as well as the $3,100,000 interest actually paid, thus following the prior decision on this point. The Court said at page 393:

> "Section 6939, C.G.L. 1927, provides that any person willfully violating the provisions of Section 6938, supra, shall forfeit the entire interest so charged, or contracted to be charged, or reserved, and when the usurious interest *has been* taken, or reserved, or has been paid, then, and in that event, the guilty person, who has taken or reserved or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest *has been* reserved, taken, or exacted in any way, double the amount of interest so reserved, taken, or exacted.
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> * * *
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> "It is clear therefore that both the amount of interest *actually* paid and the sum of $1,000 excess over the actual loan of $8,000 exacted by the contract or note should be doubled and forfeited to Mrs. Cole. (Emphasis supplied.)"

It is obvious that this case does not support Petitioners' contention.

In the case of *Arcus v. Green*, 57 So. 2d 30 (Fla. 1952), cited by Petitioners, the mortgagor-borrower signed a note for $2,700,000 principal with interest at 5% per annum payable $15,000 per month for thirty-five months, the balance payable three years from date. No payments on principal or interest were made. Suit was brought to foreclose four months after the date of the execution of the mortgage note. The borrower sought to recover $2,067.82 made up of seven items as follows:

1. $2,100.00 principal actually advanced on the principal sum of $2,700.00 signed for.
2. $320.00 subsequently advanced.
3. $20.00 subsequently advanced.
4. $52.50 legal fees for the mortgage loan.
5. $25.18 for insurance premium.
6. $15.00 for abstracting charges.
7. $93.14 for miscellaneous fees, including commission for placing loan.

The Court held that the $320.00 subsequently loaned or advanced were separate loans from the note in question and similarly treated the $133.32 for abstracting, insurance and miscellaneous fees, further holding that the actual principal amount received by the borrower on the $2,700.00 note was $2,152.50, made up of the $2,100.00 actual cash advanced and the sum of $52.50 for legal fees in connection with the mortgage loan. The Court then went on to hold that the amount of $547.50 ($2,700.00 minus $2,152.50) which was taken or reserved in advance or expected should be doubled under the double penalty provision of the usury statute. The Court said at page 34:

> "We hold, therefore, that the obligation here sought to be foreclosed was wholly usurious at its inception and that the lender must forfeit double the amount of interest so reserved, charged, or taken in accordance with the provisions of Section 687.04. Stated in this case, as interest payments were made by the appellants, the forfeiture will apply against the 'shares' reserved, to wit, $547.50 ($2700.00 minus $2152.50), which, when doubled the amount thereof is deducted from the amount actually loaned, will leave a balance due the lender, on the particular obligation here sought to be foreclosed, of $1,057.50. (Emphasis supplied)."

Again, it is clear that the above cited case does not support the proposition asserted by Petitioners to inflict the double penalty on interest which was never paid or reserved or taken in advance.

In addition to the fact that the cases cited by Petitioners do not support their position on the law of Florida, they steadfastly refuse to recognize that the factual situations in the above cited cases are entirely different from the case at bar. In the former, notes were taken in fictitious face amounts greater than the principal sum of the loan to the borrowers and for the purpose of concealing unlawful interest. The holders then sought to enforce payment of the full face amount of the notes plus interest thereon as set forth on the notes.

Here, Aviation Credit by contract agreed to advance specific sums of money to and for the benefit of Conner and did so to the extent of $182,630.65 in exact accordance with the written agreements executed by the parties. It did not take out, retain or "reserve" anything from the principal amounts advanced. It sought enforcement, not of the face amount of its notes, but only of the principal advances made, for the contract itself provided that adjustments were to be made if the amounts anticipated to be advanced were not advanced. No payments whatsoever of principal or interest were made by Conner or anyone in its behalf, upon any of its obligations, either in advance or subsequently in any way or manner. (Finding No. 11, R. 116).

The Court of Appeals in its opinion cited applicable Florida decisions construing the penalty section of

the usury statute and demonstrated its understanding and correct interpretation thereof by stating:

> "If it is correct to say that the $33,310.18 was taken or reserved, or has been paid by Conner, then the imposition by the court of double the amount of the usurious bonus from the true principal was proper. If there was not any payment, or any taking or reserving of usurious interest, then only full amount of the principal, without interest, may be recovered. (Petition, App. 10)
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> * * *
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> "The provision for the forfeiture of double the amount of the interest exists only if the usurious interest has been paid or has been taken or reserved. Certainly Conner did not pay the so-called bonus to Aviation Credit. Was it otherwise paid, taken or reserved? It was not, unless it can be said that a paying, taking or reserving resulted from the transfer of the amount of the bonus from Aviation Credit to Smith Aircraft. The undertaking of Conner to pay Aviation Credit the $33,310.18 constituted usury, but only because of the relationship between the two Smith corporations. By reason of that same relationship we are precluded from saying that the transfer by one of them to the other is the paying, taking or reserving of the usurious bonus. Because of the relationship, it follows that the situation is no different than if Conner had agreed to pay, but did not pay, the sum to Aviation Credit as additional interest or as a financing bonus. The interjection of the related company, Smith Aircraft, into the arrangement does not change the nature of what was done insofar as concerns the payment by Conner, or the taking or reserving by Smith Aircraft, of the bonus. Hence we reach the conclusion that it was error to determine, as the district court determined, that the bonus of $33,310.18

was paid or taken or "reserved." (Petitioners' App. II)

CONCLUSION

Neither the facts nor the law support the contentions of Petitioners that the double penalty provisions of Section 687.04, Florida Statutes, 1965, should have been imposed upon Respondent Aviation Credit since no interest or bonus was paid by or taken, reserved or exacted from the Petitioners.

In any event, the decision of the United States Court of Appeals for the Fifth Circuit was not in conflict with the applicable law of Florida and we respectfully submit that the Petition for Writ of Certiorari should be denied.

LAURENCE A. SCHOBOCK
ROBERT V. SMITH
Attorneys for Respondents

Certificate of Service

I, Robert V. Smith, one of the attorneys for the Respondents, Aviation Credit Corporation, L. B. Smith Vacuum Corporation, and L. B. Smith, in the above-styled cause, do hereby certify that copies of the Respondents' Brief in Opposition to Petition for Writ of Certiorari have this day been mailed to Henry M. Stoltair, 1601 Alfred I. duPont Building, Miami 32, Florida, Attorney for Petitioners, Conner Avenue Liquors, Inc., and E. A. Conner.

Dated this 11th day of October, 1966.

ROBERT V. SMITH